UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PRIME HEALTHCARE SERVICES D/B/A SAINT MARY'S REGIONAL MEDICAL CENTER, RENO

Employer

and **Case 32-RC-156669**

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC/NNU)

Petitioner

DECISION ON REMAND AND DIRECTION OF ELECTION

This case was remanded to the Region by the Board on June 28, 2016, for consideration of the following questions. First, I must determine whether the Board's Health Care Rule, 29 CFR §103.30 (the Rule), applies to the Employer's satellite home health and hospice facility. Next, I must determine whether the existing bargaining unit is a conforming unit under the Rule. If the existing unit is conforming, I shall determine whether the inclusion of the petitioned-for hospice nurses would render the existing unit nonconforming. If the existing unit is nonconforming, I shall reconsider whether a self-determination election among the hospice nurses would be appropriate under the principles stated in *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011).

The record was reopened and a hearing was held on July 13, 2016, for the purposes of taking additional evidence regarding the relationship between the Employer's satellite home health and hospice facility and its acute care hospital, and regarding whether the existing bargaining unit is a conforming unit under the Rule. The parties filed post-hearing briefs, which I have duly considered.

The Petitioner contends that the satellite home health and hospice facility is a part of the acute care hospital, that the satellite facility is subject to the Rule, and that the existing bargaining unit nonconforming under the Rule because of the exclusion of registered nurses who work out of the satellite facility. The Employer contends that the satellite facility is not a part of the acute care hospital, that the satellite facility is not subject to the Rule, and that the existing bargaining unit is a conforming unit under the Rule.

For the reasons set forth below, I have determined that: 1) the Rule does not apply to the Employer's satellite facility, which is not a part of the Employer's acute care hospital; 2) the existing unit is nonconforming because it does not include all of the registered nurses who work in the acute care hospital; and 3) contrary to my prior determination, and upon reconsideration of the record evidence, hospice nurses constitute an identifiable, distinct segment of the Employer's unrepresented employees and are an appropriate voting group for a self-determination election.

Background

The facts set forth in my original decision concerning the Employer's operations and the community of interest among the employees at issue will not be repeated here. The relevant additional evidence adduced at the hearing is as follows.

The Employer, Prime Healthcare Services, owns Saint Mary's Health Network. Saint Mary's Health Network includes Saint Mary's Regional Medical Center (the Medical Center), the acute care hospital involved in this matter; the satellite home health and hospice facility at issue in this case; and various other medical facilities that are located away from the Medical Center including a laboratory, urgent care clinics, imaging centers, a radiation oncology center, and a fitness center. Chief Nursing Officer Mary Kate Grimm testified that the Employer's home health and hospice divisions each operate under separate business licenses from the Medical Center, as do various other offsite facilities located within Saint Mary's Health Network. Saint Mary's Health Network has one human resources department which commonly serves the Medical Center and the various other facilities located within the network. The satellite home health and hospice facility obtains its supplies from the Employer's central supply unit, which is located within the Medical Center. The Medical Center has janitorial services provided by in-house employees, while the satellite facility contracts with a separate vendor to provide its janitorial services.

Chief Nursing Officer Grimm testified that all of the bargaining unit nurses work in the Medical Center. As reflected in the unit description set forth below, there are also numerous non-unit nurses who work in the Medical Center. Grimm testified that the only non-unit nurses who do not work at the Medical Center are hospice nurses, home health nurses, room care nurses, and radiation oncology nurses.[1]

The Employer's hospice division maintains contracts with three different hospitals in the community: the Medical Center, located about 5 miles from the satellite facility; a hospital in Carson City, Nevada, located about 20 miles from the satellite facility; and a hospital located in Fallon, Nevada, located about 40 miles from the satellite facility.[2] When a hospice patient develops a condition that requires admission to a hospital, they are admitted to the hospital located closest to their residence. Accordingly, hospice patients are sometimes, but not always, admitted to the Medical Center when they require acute hospital care. Once hospice patients have been admitted to a hospital, hospice nurses continue to visit their patients in the hospitals on a daily basis to assist with creating and updating the plan of care for the patient.

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[1] Grimm did not explain the functions of "room care nurses" and "radiation oncology nurses," and she did not indicate where they worked, but it is evident from the record that they do not work at the satellite home health and hospice facility.

[2] The record does not indicate whether the Carson City and Fallon hospitals are owned by the Employer, or another entity.

Since the closing of the last hearing, the parties have ratified a new collective-bargaining agreement with effective dates of April 21, 2016, through March 31, 2019. The bargaining unit remains unchanged under the current agreement, and consists of:

> All full-time and regular part-time and per diem registered nurses who are employed to provide direct patient care and required to possess a current RN license, charge nurses where their duties do not otherwise exclude them from the unit, registered nurses who would otherwise be included by their assignment and place of work who work in Hospital departments outside the nursing department such as cardiac catheterization laboratories, radiology, GI laboratories, and outpatient surgery facilities that are integrated with the hospital, all emergency department case managers, clinical case managers, cardiac rehabilitation nurse clinicians, and educators-pediatric/intensive care nursery, employed by the employer at its facility located at 235 West 6th Street, Reno, Nevada.

The existing bargaining unit excludes:

> clinical educators, patient educators, clinical nurse specialists, nurse practitioners, certified nurse midwives, nurse anesthetists, staffing coordinator/bed control nurses, infection control nurses, employee health nurses, nurse auditors, computer nurses, quality improvement/assurance nurses, utilization review nurses, risk management nurses, discharge planning nurses, research nurses, nurse recruiters, customer relation nurses, interim permitees, registry and traveler nurses, perinatal education coordinators, patient placement specialists, infection control coordinators, all women religious regardless of their employee assignment, employees of outside registries and other agencies supplying labor to the employer, all supervisory and confidential employees as defined by the National Labor Relations Act, all other employees who are not registered nurses, and all home health agencies and registered nurses employed by home health agencies.

The parties stipulated that the Employer no longer utilizes the titles of discharge planning nurses or interim permitees. The parties further stipulated that the remainder of the excluded classifications listed above are required to be registered nurses, and that they are not statutory supervisors or managerial employees within the meaning of the Act.

Analysis

In conformity with the Board's remand, I shall address the questions presented in the following order: 1) whether the conforming unit requirements of the Rule apply to the Employer's satellite home health and hospice facility; 2) whether the existing bargaining unit is a conforming unit under the Rule; and 3) if the existing unit is nonconforming, whether a self-determination election among the Employer's hospice nurses would be appropriate.

In the Rule, "acute care hospital" is defined as either a short term care hospital in which the average length of patient stay is less than 30 days, or a short term care hospital in which over 50 percent of all patients are admitted to units where the average length of patient stay is less

than 30 days. 29 CFR § 103.30(f). The definition includes those hospitals operating as acute care facilities even if the hospitals provide such services as long term care, outpatient care, psychiatric care, or rehabilitative care. The rule does not specify whether it applies only to individual, freestanding hospital facilities, or whether it also extends to facilities that are integrated with acute care hospitals to varying degrees and a part of the same network as acute care hospitals. It appears that the Board has not yet squarely addressed this issue.

In *Virtua Health Inc.*, 344 NLRB 604 (2005), the employer argued that the petitioned-for unit of paramedics was inappropriate because it excluded other technical employees within the employer's healthcare system, which included an acute care hospital. The employer argued that the Rule applied not only to individual acute care hospital facilities, but to systems of health care facilities that include acute care hospitals, and that, accordingly, only a system-wide unit of all of its technical employees would have been appropriate under the Rule. The petitioner argued, and the Regional Director found, that the Rule was not applicable to health care systems. The Board majority found it unnecessary to reach the issue of the applicability of the Rule to health care systems because it determined that even under the community of interest test that was then applicable to nonacute health care facilities, a unit limited to paramedics was inappropriate.

In *Stormont-Vail Healthcare*, 340 NLRB 1205 (2003), the employer argued that the only appropriate unit of registered nurses was an employerwide unit composed of a hospital complex which housed an acute care hospital and other medical divisions, plus seven other buildings located within six blocks of the hospital complex. The Regional Director determined that the employer's hospital complex was "much more extensive and inclusive than a single acute care hospital," and concluded that the Rule did not apply. The Board overturned the Regional Director's decision on other grounds, and did not address the Regional Director's conclusion regarding the applicability of the Rule.

In *Visiting Nurses Assn. of Central Illinois*, 324 NLRB 55 (1997), the employer argued that the petitioned-for unit of home health and hospice nurses was inappropriate because the home health facility was a part of the employer's acute care hospital located two and a half blocks away, and that the Rule required a hospital-wide unit of registered nurses. The Regional Director concluded that the home health facility and the hospital were separate employers and that the Rule accordingly did not apply, and that the petitioned-for unit was appropriate. The Board agreed with the Regional Director's ultimate conclusion that home health and hospice nurses were an appropriate unit, but it did not rely on the Regional Director's finding that the home health facility and the hospital were separate employers. Rather, the Board found that even assuming the home health facility and the acute care hospital were a single employer, the petitioned-for single-facility unit was appropriate. The Board did not address the applicability of the Rule, but its decision would seem to suggest that the Board is not inclined to take the view that the Rule's requirements extend beyond individual acute care facilities.

In the absence of any authority that the Rule should be applied to healthcare networks that include various facilities in addition to an acute care hospital, I conclude that the satellite home health and hospice facility in this case should not be subject to the Rule's requirements

unless it is a part of the Medical Center such that the satellite facility and the Medical Center are properly treated as a combined, single facility.[3] The record establishes that the satellite facility and the Medical Center are commonly owned by the Employer, that they share common upper level management, and that they are served by a common human resources department. The facilities are geographically separated, however, by five miles. The home health and hospice operations each operate under separate business licenses from the Medical Center. Furthermore, the satellite facility does not exclusively contract with the Medical Center, but also maintains contracts with two other hospitals. In these circumstances, I conclude that the satellite facility and the Medical Center are not so integrated that they should be treated as a combined, single facility, and I therefore conclude that the satellite facility is not subject to the conforming unit requirements of the Rule.

I turn next to the question of whether the existing bargaining unit is a conforming unit under the Rule. In an effort to avoid the undue proliferation of bargaining units in acute care settings, the Rule designates eight specific units that would be appropriate in acute care facilities, with the only appropriate unit of registered nurses being a unit including "all registered nurses." 29 CFR § 103.30(a). The existing unit is nonconforming because, as indicated above, it excludes registered nurses who work at the Medical Center who are not statutory supervisors or managerial employees. Therefore, the existing unit does not conform with the Rule because it does not include "all registered nurses" who work at the Medical Center, an acute care facility.[4]

Where there are existing nonconforming units, the Rule states that questions regarding unit appropriateness shall be decided "by adjudication." 29 CFR § 103.30 (c). In *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011), the Board noted that the Rule only addresses the initial organizing of units in acute care facilities, and does not address the situation where an acute care facility was partially organized in a nonconforming unit. The Board further found that although the Rule states that the Board should find appropriate only those units which comport "insofar as practicable" with the eight appropriate units defined by the Rule, the plain language of the rule only provides that the Board must make that determination when the petitioner seeks additional units. *Ibid.* at fn. 8. The Board reasoned that where, as here, a petitioner is not seeking to create an additional unit, but is seeking to add employees to a preexisting nonconforming unit, a self-determination election is appropriate even if the resulting unit would also be a nonconforming unit. Following that rationale in the instant case, I conclude that a self-determination election among hospice nurses to determine whether they wish to be added to the existing nonconforming unit is appropriate so long as hospice nurses share a

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[3] I note that if the Rule were found to be applicable to entire healthcare systems which include acute care hospitals, it would in some cases result in very large bargaining units that span extensive geographic areas. Furthermore, a finding that the Rule applied to entire healthcare systems would lead, in many situations, to units which include numerous non-acute healthcare facilities.

[4] While the Employer contends that the existing unit is a conforming unit under the Rule, it does not explain why it believes the unit exclusions do not render the unit nonconforming.

community of interest with the existing unit and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

In my previous decision, I concluded that hospice nurses did not constitute an appropriate voting group under *Warner Lambert.* I concluded that although hospice nurses shared a community of interest with the employees in the existing unit, they did not constitute an "identifiable, distinct segment" from the home health nurses whom the Petitioner does not seek to represent. Having reconsidered the record evidence, I have determined that I failed to give the appropriate weight to the following facts regarding the separate identity of hospice nurses from the home health nurses. First, hospice and home health are identifiable as separate departments within the Employer's operation, and the two departments are physically separated within the satellite facility. Second, hospice nurses are identifiable as a distinct segment of employees because they are given a different classification from home health nurses. Third, the work that hospice nurses perform is distinguishable from the work performed by home health nurses because it is grounded in a different philosophy, i.e., palliative care versus rehabilitative care. Fourth, there is no record evidence of interchange between hospice and home health nurses. And finally, hospice nurses and home health nurses have different front line supervision. Furthermore, I now know that hospice and home health each operate under their own separate business licenses. For all of these reasons, I now conclude that hospice nurses do, in fact, constitute an identifiable, distinct segment of the Employer's unrepresented employees. I will therefore direct a self-determination election among the hospice nurses to determine whether they wish to join the existing bargaining unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by California Nurses Association/National Nurses Organizing Committee (CNA/NNOC/NNU).

The election in this case will be held in abeyance pending the investigation and disposition of the unfair labor practice charges in Cases 32-CA-157381 and 32-CA-162431. Accordingly, the details regarding the election will not be established at this time. After the charges in Cases 32-CA-157381 and 32-CA-162431 have been resolved, and after consultation with the parties, the Regional Director will issue a letter setting forth the election arrangements.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: August 9, 2016

/s/ George Velastegui

George Velastegui
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